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82-440

IN THE

Supreme Court of the United States

OCTOBER 1982 TERM

In re FARMERS UNION CENTRAL EXCHANGE, INC.; FARMERS PETROLEUM COOPERATIVE, INC.; FOX, INC.; LANDMARK, INC.; LAND O'LAKES, INC.; MIDLAND COOPERATIVES, INC.; MFA OIL COMPANY; and TENNESSEE FARMERS COOPERATIVE,

Petitioners.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

Did the Bankruptcy Court exceed its constitutional authority by continuing to assert jurisdiction over state-law claims after this Court held that "the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim"? *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 102 S.Ct. 2858, 2880 n.40 (1982).

LIST OF PARTIES

In addition to the eight petitioners listed in the caption, the parties to the litigation below were Energy Cooperative, Inc.; the Algerian national petroleum company, Societe Nationale Pour La Recherche, La Production, La Transport, La Transformation Et La Commercialisation Des Hydrocarbures ("Sonatrach"); and the seven banks listed below:

1. Continental Illinois National Bank and Trust Company of Chicago
2. Seattle First National Bank
3. First National Bank of Minneapolis
4. First National Bank and Trust Company of Oklahoma City
5. Bank of Montreal (California)
6. First National Bank of Boston
7. St. Louis Bank for Cooperatives.

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PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit denying the Petition for a Writ of Mandamus is unreported; it is reproduced in the Appendix attached hereto at page 1a. The opinion of the Bankruptcy Court for the Northern District of Illinois denying petitioners' motion to dismiss or stay proceedings is also unreported; it is reproduced in the Appendix at page 4a.

JURISDICTION

The Court of Appeals entered judgment denying the Petition for a Writ of Mandamus on August 13, 1982, 22 days after the Bankruptcy Court denied petitioners' motion to dismiss or stay proceedings for lack of jurisdiction on July 22, 1982.

This Court has jurisdiction over the petition for a writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651(a). This Court also has jurisdiction under 28 U.S.C. § 1254(1) to treat the petition as one for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *See Collier* v. *United States*, 382 U.S. 890 (1965), 384 U.S. 59 (1966); *Schlagenhauf* v. *Holder*, 379 U.S. 104, 109 (1964).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 1 of the Constitution:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

28 U.S.C. § 1471 (1976 ed., Supp. III), added by Section 241(a) of the Bankruptcy Act of 1978, Pub. L. 95-598, 92 Stat. 2549:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.
>
> (c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

The All Writs Act, 28 U.S.C. §1651(a):

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

Petitioners seek a writ of mandamus directing the Honorable Frederick J. Hertz of the United States Bankruptcy Court for the Northern District of Illinois to dismiss the complaints brought against petitioners on the grounds that the Bankruptcy Court's jurisdiction over such state-law claims violates Article III of the Constitution.

The eight petitioners are each agricultural cooperatives, and they are referred to in this litigation as the "Member-Owners."[1] In 1976, they formed Energy Cooperative, Inc. ("ECI"), which purchased an oil refinery in East Chicago,

[1] Pursuant to Supreme Court Rule 28.1, petitioners state that none of them has a parent corporation, subsidiary (other than wholly owned subsidiaries) or affiliate, except for the following corporations: Landmark Commodities, Inc., Select Seeds, Inc., Silver Grove Fleeting, Inc., Imperial, Inc., Imperial Packaging, Inc., and Lea Foods, Inc.

Indiana. On May 15, 1981, ECI filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq.*, in the Bankruptcy Court for the Northern District of Illinois. ECI subsequently commenced an adversary proceeding in that Court against the Member-Owners, seeking to recover $164,403,000 for an alleged breach of a stock subscription agreement governed by state law. Seven banks that had provided secured loans to ECI intervened as plaintiffs in that action, and their Amended Complaint against the Member-Owners seeks $257,171,814.89 under several theories, all arising under state law. ECI and the banks also commenced an adversary proceeding against a number of ECI's suppliers. One of those suppliers, the Algerian national petroleum company known as "Sonatrach," brought a counterclaim against ECI and the banks, demanding over $20,000,000 in compensatory damages for willful and fraudulent misconduct. The banks thereupon brought a third party complaint against the Member-Owners seeking common-law indemnity for any liability the banks might incur to Sonatrach.

In December 1981, the Member-Owners moved to dismiss the actions then pending on the grounds that 28 U.S.C. § 1471 unconstitutionally vested jurisdiction over these claims in bankruptcy judges who do not have life tenure and who are not appointed pursuant to Article III of the Constitution.[3] Bankruptcy Judge Hertz denied that motion in January 1982.

Following this Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 102 S.Ct. 2858

[3] Pursuant to Supreme Court Rule 28.4(b), petitioners state that 28 U.S.C. § 2403(a) may be applicable and that the Bankruptcy Court certified that fact to the Attorney General on December 11, 1981.

(1982), the Member-Owners renewed their motion to dismiss and sought, in the alternative, that the proceedings be stayed. Judge Hertz denied that motion (Appendix, p. 4a) on the basis of a "General Order" issued by the District Court for the Northern District of Illinois, which stated:

> GENERAL ORDER
>
> Upon review of the opinion of the Supreme Court in the case of *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co., et al.*, No. 81-150, and with particular reference to the case of *Buckley* v. *Valeo*, 424 U.S. 1, 143 (1976), cited therein as expositive of the meaning of the order staying the Court's judgment until 4 October 1982, it is the view of this court that for the period of the stay the *Marathon* case does not affect the jurisdiction of the bankruptcy court. It is further the opinion of this court that no stay of any proceedings in the bankruptcy court prior to 4 October 1982 is warranted by the *Marathon* decision. . . . (Appendix, p. 7a).

The Member-Owners then filed a Petition for a Writ of Mandamus in the Seventh Circuit. The Court of Appeals denied the petition on August 13, 1982, finding "that there has been no abuse of discretion on the part of Judge Hertz of the Bankruptcy Court" in continuing to exercise jurisdiction.[2] (Appendix, p. 3a).

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[2] After filing the mandamus petition in the Seventh Circuit, the Member-Owners filed an Application for Leave to Appeal in the District Court pursuant to Section 405(c) of the Bankruptcy Act of 1978. Inasmuch as the District Court had already expressed its views in the General Order, the purpose of this interlocutory appeal was to provide an alternative avenue of review by the Seventh Circuit. Plaintiffs have opposed petitioner's request for interlocutory review, and the District Court has neither considered the application nor decided whether it will allow an appeal.

REASONS FOR GRANTING THE WRIT

Although six Justices of this Court agreed in *Northern Pipeline* that bankruptcy judges cannot constitutionally hear state-law claims brought against third parties, a number of federal courts around the country, including the court below, have authorized continued jurisdiction over such cases.[4] They have reasoned that when this Court granted a "limited stay" of its judgment until October 4 to avoid "impairing the interim administration of the bankruptcy laws," it issued an affirmative command to the Bankruptcy Courts that they should put aside the requirements of Article III, at least until October 4, and exercise the full range of jurisdiction conferred by 28 U.S.C. § 1471, *including jurisdiction over state-law claims having nothing to do with the administration of any provision of the Bankruptcy Code.*

To compel obedience to the Constitution, this Court should issue a writ of mandamus requiring dismissal of the

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[4] *See In re Otero Mills*, No. 82-00217 M.L., CCH Bankr. L. Rep. ¶ 68,754 (Bankr. D.N.M. July 14, 1982); *In re O.P.M. Leasing Services, Inc.*, No. 81-B-10533, CCH Bankr. L. Rep. ¶ 68,753 (Bankr. S.D.N.Y. July 16, 1982); *In re Cherry Pond Coal Co.*, No. 82-2317 (S.D.W.Va. July 22, 1982), *rev'g sub nom. Armco, Inc. v. Cherry Pond Coal Co.*, No. 81-20504, CCH Bankr. L. Rep. ¶ 68,755 (Bankr. S.D.W.Va. July 16, 1982).

On the other hand, the Bankruptcy Court for the District of Minnesota (which originally heard the *Northern Pipeline* case) has stayed all "nonbankruptcy law" proceedings. (Appendix, p. 8a). Similarly, in *In re Southern Distilleries*, No. 82-00312 (Bankr. M.D.Ala. July 22, 1982), the Bankruptcy Court abstained from hearing a case that could be brought in state court: "If there is jurisdiction in this court, the court feels that, in light of the *Northern Pipeline* decision, if should be exercised only under the most extraordinary circumstances. . . . The issue presented here is obviously cognizable by the state court and should be decided there. If this court has jurisdiction, which is doubtful, it abstains."

state-law claims which the Bankruptcy Court has no constitutional authority to hear. Allowing such litigation to proceed will only lead to uncertainty, delay and more litigation. Any judgment rendered by the Bankruptcy Court may be subject to appeal for lack of jurisdiction.[8] Indeed, any action taken by the Bankruptcy Court during the course of the litigation may be subject to reconsideration if the case ultimately comes before a court of competent jurisdiction. These problems, moreover, will only worsen if the Court extends the stay beyond October 4 because of inaction by Congress. In short, both the command of the Constitution and the interests of sound judicial administration dictate that state-law claims should be dismissed sooner rather than later.

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[8] In *Northern Pipeline*, the Court said "our decision today shall apply only prospectively." 102 S.Ct. at 2880. The meaning of "prospectivity" in the jurisdictional context is well established: a judgment which has become final cannot be challenged *collaterally* but it can be challenged on direct appeal. In other words, when a restriction on jurisdiction is applied "prospectively," it applies to all pending cases, including those on appeal. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 376-77 (1940) (Supreme Court decision holding unconstitutional the bankruptcy courts' jurisdiction to adjust municipal debts cannot be invoked once a judgment has become final, but can be raised on appeal from the judgment); *Smallwood* v. *Gallardo*, 275 U.S. 56, 61 (1927) (Holmes, J.) ("To apply the [new restriction on jurisdiction] to present suits is not to give it retrospective effect"); *Baltimore & Potomac R. Co.* v. *Grant*, 98 U.S. 398, 401 (1879) (applying a new restriction on jurisdiction to pending cases "is undoubtedly prospective in its operation," for it "destroys no vested rights" and "does not set aside any judgment already rendered"); *Goss* v. *Mayden*, 413 U.S. 665, 671-72 n.5 (1973) (Supreme Court decision holding unconstitutional the jurisdiction of military courts to try certain offenses cannot be invoked in a collateral challenge to a conviction, but all convictions not yet final must be vacated).

I. This Court Did Not "Suspend" The Constitution By Staying Its Judgment

The "limited stay" which this Court granted in *Northern Pipeline* has been interpreted in two ways. Some authorities have reasoned that this Court "stayed . . . the finding of unconstitutionality" until October 4,[6] and on that basis have concluded that bankruptcy judges should exercise the full range of jurisdiction conferred by the Bankruptcy Act, without regard to whether such jurisdiction is permitted by the Constitution.[7] The opposing view is that the Constitution must be upheld, and that bankruptcy judges are therefore precluded from exercising jurisdiction over state-law claims; they can, however, continue with "the interim administration of the bankruptcy laws" in accordance with the stay granted in *Northern Pipeline*, 102 S.Ct. at 2880.

The courts that are allowing continued jurisdiction over state-law claims have failed to distinguish between the *con-*

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[6] *In re O.P.M. Leasing Services, Inc.*, No. 81-B-10533, CCH Bankr. L. Rep. ¶ 68,753 at p. 81,022 (Bankr. S.D.N.Y. July 16, 1982).

[7] Indeed, such courts have treated the stay, not merely as a suspension of the finding of unconstitutionality, but as an instruction from this Court that they should *ignore* constitutional challenges to the statute conferring jurisdiction. In taking this approach, such courts have abdicated what *Marbury* v. *Madison* called "the very essence of judicial duty":

> "If both the law [conferring jurisdiction] and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. *This is of the very essence of judicial duty.*" *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (emphasis added) (dismissing meritorious case because statute conferring jurisdiction violated Article III of the Constitution).

stitutional holding in *Northern Pipeline*—that "the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim"[8]—and the *statutory* holding invalidating all of 28 U.S.C. § 1471 because "the remaining grant of authority to Bankruptcy Courts" under § 1471 is "not readily severable." 102 S.Ct. at 2882 (concurring opinion). The entire statute was invalidated, not because the Court found "the remaining grant of authority" to be *unconstitutional*, but because it was unsure whether Congress would want to retain the existing Bankruptcy Court system if the judges could not hear the debtor's state-law claims. "We think it is for Congress to determine the proper manner of restructuring [bankruptcy jurisdiction] . . . in the way that will best effectuate the legislative purpose." 102 S.Ct. at 2880 n.40. In short, by invalidating the entire statute, *Northern Pipeline* allowed Congress to write on a clean slate; and by staying that judgment until October 4, the Court gave Congress time to act:

> "This limited stay will afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." 102 S.Ct. at 2880.

This Court should make it clear that the stay means what it says: it authorizes "the interim administration of the bankruptcy laws," not continued jurisdiction over state-law claims in violation of Article III. If the stay is confined to its terms, there is no constitutional problem; this Court undoubtedly has the authority to allow the *constitutional* portion of a statute to remain in effect while Congress is

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[8] 102 S.Ct. at 2880 n.40 (plurality opinion); *accord*, 102 S.Ct. at 2882 (concurring opinion) ("I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art. III of the United States Constitution").

deciding how to revise it. But the requirements of the Constitution cannot similarly be suspended. Although the Court has occasionally stayed the *remedy* for a constitutional violation, it has never "stayed . . . the finding of unconstitutionality." (See note 6, *supra*). For example, in the reapportionment cases, where the Court has generally allowed legislatures to continue sitting until the next scheduled election, the delay in imposing a *remedy* did not affect the *holdings* that the apportionments were unconstitutional. *See, e.g., Maryland Committee* v. *Tawes*, 377 U.S. 656, 675-76 (1964). It is well established that the laws passed by such a legislature are valid. *Buckley* v. *Valeo*, 424 U.S. 1, 142 (1976). But it is equally well established that the judgment of a court without jurisdiction cannot stand. Although such a judgment is protected by *res judicata* once it becomes final, if the court's jurisdiction is found to be unconstitutional while the case is still "open to direct review," any judgment must be vacated. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 376-77 (1940).

In sum, neither the language nor the logic of the *Northern Pipeline* decision justifies the conclusion reached below that Bankruptcy Courts should ignore the Constitution and continue exercising jurisdiction over state-law claims.

II. There Is No Need To Stay The Judgment Dismissing State-Law Claims

If the Constitution is obeyed and state-law claims are dismissed, they can immediately be re-filed in a state or federal court of competent jurisdiction.[9] Indeed, under the former Bankruptcy Act, the receiver or debtor-in-possession in a Chapter XI case could *only* bring state-law claims such

[9] Unlike cases brought under the Bankruptcy Code, which are within the *exclusive* jurisdiction of the Bankruptcy Courts, state-law claims can be litigated in state court. *Compare* 28 U.S.C. § 1471(a) *with* § 1471(b). Such claims, of course, can also be brought in the district court if diversity jurisdiction is present.

as these in state court (unless the defendant consented or there was an independent basis for federal jurisdiction). "The purpose . . . was to leave such controversies to be heard and determined for the most part in the state courts." *Schumacher* v. *Beeler*, 293 U.S. 367, 374 (1934). Requiring state-law claims to be litigated in state court will not impair "the interim administration of the bankruptcy laws," for, as *Northern Pipeline* made clear, the Bankruptcy Court's jurisdiction over such claims goes "far beyond that which can even arguably be characterized as merely incidental to the discharge in bankruptcy or a plan for reorganization." *Id.* at 2876 n.31 (plurality opinion). "[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights." *Id.* at 2871.

Thus, there is no reason to extend the *Northern Pipeline* stay if Congress fails to act by October 4. Not only are there alternative forums that can hear state-law claims, there are also alternative forums with jurisdiction to administer the bankruptcy laws. Under 28 U.S.C. § 1334, which remains in effect until April 1, 1984, the *district* courts "have original jurisdiction of . . . all matters and proceedings in bankruptcy."[10] They also have federal question jurisdiction with respect to all civil actions arising under the Bankruptcy Code. *See* 28 U.S.C. § 1331. Therefore, if the Court allows the stay to expire, the district courts will have full authority to entertain petitions under the Bankruptcy Code, to grant the remedies provided therein, and to administer estates. *See White* v. *Ewing*,

[10] After April 1, 1984, an amendment to § 1334 goes into effect which limits the district courts to appellate jurisdiction. *See* Sections 238(a) and 402(b) of the Bankruptcy Act of 1978. During the "transition period" between October 1, 1979 and April 1, 1984, the Act provides that the district courts' original jurisdiction is to be exercised by the Bankruptcy Courts, but of course that delegation of jurisdiction was invalidated in *Northern Pipeline*.

159 U.S. 36, 39-40 (1895) ("where an insolvent corporation is placed in the hands of a receiver of the Circuit Court, such appointment draws to the jurisdiction of that Court the control of its assets"). The district courts would not, however, have jurisdiction over state-law claims such as these, which do not involve property in the "actual or constructive possession" of the court.[11]

Thus, if Congress fails to act by October 4, 1982, and the *Northern Pipeline* stay expires in accordance with its terms, there will be no jurisdictional vacuum. State-law claims can be litigated in the state courts and, until April 1, 1984, bankruptcy matters can be heard in the district courts.

III. A Writ Of Mandamus Is Appropriate To Restrain The Unconstitutional Exercise Of Jurisdiction

This is a classic case for issuing a writ of mandamus: the issue presented is jurisdictional; it is a pure question of law; it calls for no appraisal of facts and no exercise of discretion; it is an issue of undoubted importance and urgency affecting thousands of cases around the country; and it is an issue that cannot await review through the normal channels of appeal and certiorari, for by then the damage will be done. Much litigation will have to be repeated in courts of competent jurisdiction.

The purpose of mandamus is to "afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction." *Ex parte Republic of Peru*, 318 U.S. 578, 583 (1943). Indeed, that is "the traditional use of the writ . . . both at common law and in the federal courts." *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943); *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382 (1953); *Schlagenhauf* v. *Holder*,

[11] *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U.S. 426, 433-34 (1924); *Cline* v. *Kaplan*, 323 U.S. 97, 98 (1944).

379 U.S. 104, 109-10 (1964); *Will* v. *United States*, 389 U.S. 90, 95 (1967); *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976); *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 352 (1976); *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978).

In the present case, the writ should issue directly from this Court[12] in order to give an authoritative interpretation to *Northern Pipeline;* only this Court can "formulate the necessary guidelines in this area." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 112 (1964). "This court has full power in its discretion to issue the writ of mandamus, . . . although the case is one in respect of which direct appellate jurisdiction is vested in [a lower] court, . . . where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this court should be taken." *Ex parte Republic of Peru*, 318 U.S. 578, 584-85 (1943); *accord, Ex parte United States*, 287 U.S. 241, 248-49 (1932); *Los Angeles Brush Corp.* v. *James*, 272 U.S. 701 (1927); *Maryland* v. *Soper*, 270 U.S. 9 (1926); *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945). "If it clearly appeared . . . that a practice had been adopted by district judges, as to the order or procedure in hearing causes, at variance with [this Court's] rules, our writ might well issue directly to such judges." *Los Angeles Brush Corp.* v. *James*, 272 U.S. 701, 706 (1927); *accord, Ex parte United States*, 287 U.S. 241, 249 (1932).

[12] If the Court decides not to grant a writ of mandamus, petitioners request that their papers be treated as a petition for a writ of certiorari to the Seventh Circuit. *See Collier* v. *United States*, 382 U.S. 890 (1965).

CONCLUSION

Because Article III of the Constitution prohibits bankruptcy judges from hearing state-law claims, this Court should issue a writ of mandamus directing the Bankruptcy Court to dismiss the complaints against petitioners.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

August 13, 1982

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

FARMERS UNION CENTRAL EXCHANGE, INC., et al., *Petitioners,*	
No. 82-2211	
v.	Original Petition for Writ of Mandamus
HONORABLE FREDERICK J. HERTZ, United States Bankruptcy Judge, *Respondent.*	

This matter comes before the court for its consideration of the following documents:

1. The "PETITION FOR A WRIT OF MANDAMUS" filed on July 30, 1982, by counsel for petitioners.

2. The "RESPONDENTS' ANSWER TO THE PETITION FOR A WRIT OF MANDAMUS" filed on August 9, 1982, by counsel for respondents.

3. The "MOTION FOR A STAY OF PROCEEDINGS BELOW PENDING DECISION BY THIS COURT" filed on August 3, 1982, by counsel for petitioners.

4. The "MOTION TO ESTABLISH PROCEDURES FOR AN EXPEDITED APPEAL" filed on August 3, 1982, by counsel for petitioners.

5. The "RESPONDENTS' MEMORANDUM IN OPPOSITION TO THE MEMBER-OWNERS' MOTIONS FOR A STAY OF THE PROCEEDINGS BELOW AND FOR THE ESTABLISHMENT OF EXPEDITED PROCEDURES" filed on August 9, 1982, by counsel for respondents.

Petitioners have requested that this Court stay the lower court proceedings pending decision on the petition for a writ of mandamus and expedite the procedures before this Court. In view of this order, it is not necessary for us to rule on these requests.

Petitioners have presented this Court with a Petition for Writ of Mandamus following the entry of an interlocutory order by the Bankruptcy Court denying their motion to dismiss or stay the proceedings before that Court. Pursuant to 28 U.S.C. § 1334(b), "the district courts . . . shall have jurisdiction of appeals from interlocutory orders and decrees of bankruptcy courts, but only by leave of the district court to which the appeal is taken." It appears then that this Petition for Writ of Mandamus is an inappropriate vehicle for seeking interlocutory review in this Court.

Petitioners are challenging the Bankruptcy Court's jurisdiction over certain state-law claims. A challenging assumption of jurisdiction must be plainly wrong. This Court made clear that, "if a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus. . . ." *Comfort Equipment Co.* v. *Steckler*, 212 F.2d 371, 373 (7th Cir. 1954) (*citing American Airlines* v. *Forman*, 204 F.2d 230, 232 (3d Cir. 1953)).

On June 28, 1982, the United States Supreme Court decided *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 50 U.S.L.W. 4892, and held that the broad grant

of jurisdiction to the bankruptcy courts contained in the Bankruptcy Act of 1978 is unconstitutional. The Supreme Court, however, stayed judgment in that case until October 4, 1982, to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudicating, without impairing the interim administration of the bankruptcy laws." *Id.* at 4902.

On July 14, 1982, the Chief Judge of the United States District Court for the Northern District of Illinois, entered a General Order that said in part: ". . . That during the time the order of the Supreme Court staying the *Marathon* judgment is in effect no cause cognizable in bankruptcy under the Bankruptcy Reform Act of 1978 will be heard by the district court except as provided by that Act." While the above General Order on its face would seem self-contradictory, we will assume for the present purposes that it contemplates and authorizes continued handling by bankruptcy judges, during the pendency of the stay in *Northern Pipeline*, of proceedings specifically enumerated in the Act. The Act grants the bankruptcy courts jurisdiction over "all civil proceedings arising under title 11, the Bankruptcy title, or arising in or related to cases under title 11." 28 U.S.C. § 1471(b) (1976 ed., Supp. III).

For these reasons, we find that there has been no abuse of discretion on the part of Judge Hertz of the Bankruptcy Court and the Petition for Writ of Mandamus is DENIED.

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re ENERGY COOPERATIVE, INC., Debtor.	Chapter 11 No. 81 B 005811
ENERGY COOPERATIVE, INC., Plaintiff, and CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, et al., Intervening Plaintiffs, v. FARMERS UNION CENTRAL EXCHANGE, INC., et al., Defendants.	Adversary No. 81 A 3286
ENERGY COOPERATIVE, INC., et al., Plaintiffs, v. THE PERMIAN CORPORATION, et al., Defendants.	Adversary No. 81 A 2075

SOCIETE NATIONALE POUR LA RECHERCHE, LA PRODUCTION, LA TRANSPORT, LA TRANSFORMATION ET LA COMMERCIALISATION DES HYDROCARBURES, Counter-Plaintiff, v. CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, et al., Counter-Defendants and Third Party Plaintiffs, v. FARMERS UNION CENTRAL EXCHANGE et al., Third Party Defendants.	Adversary No. 81 A 2075

ORDER

At Chicago, Illinois, in
said District and Division
July 22, 1982

This matter coming on to be heard on the motion of Defendants herein to dismiss for lack of jurisdiction or in the alternative to stay all proceedings until October 4, 1982, and to stay all proceedings pending decision on Defendants' motion to dismiss for lack of jurisdiction; due notice having

been given to all parties entitled thereto; the court having considered said motions, the memoranda filed by the parties, arguments of counsel and the court having considered the General Order entered by the District Court on July 14, 1982; the court having concluded that the appropriate procedure to be followed in these cases in light of the decision of the United States Supreme Court in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 50 U.S.L.W. 4892 (1982) is to continue until October 4, 1982, exercising all of the jurisdiction provided in chapter 90 of Title 28 of the United States Code; and the court being fully advised in the premises;

IT IS HEREBY ORDERED that the motions of Defendants be and they hereby are denied.

ENTER:

/s/ FREDERICK J. HERTZ
Bankruptcy Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

GENERAL ORDER

Upon review of the opinion of the Supreme Court in the case of *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co., et al.*, 81-150, and with particular reference to the case of *Buckley* v. *Valeo*, 424 U.S. 1, 143 (1976), cited therein as expositive of the meaning of the order staying the Court's judgment until 4 October 1982, it is the view of this court that for the period of the stay the *Marathon* case does not affect the jurisdiction of the bankruptcy court. It is further the opinion of this court that no stay of any proceedings in the bankruptcy court prior to 4 October 1982 is warranted by the *Marathon* decision.

By direction of the full Court met in special session on Tuesday, 13 July 1982:

IT IS HEREBY ORDERED That during the time the order of the Supreme Court staying the *Marathon* judgment is in effect no cause cognizable in bankruptcy under the Bankruptcy Reform Act of 1978 will be heard by the district court except as provided by that Act.

IT IS FURTHER ORDERED That any such cases filed with the district court during such period will be remanded to the bankruptcy court.

ENTER:

FOR THE COURT

/s/ FRANK M. MCGARR
(Chief Judge)

Dated at Chicago, Illinois, this 14 day of July, 1982.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

GENERAL ORDER IN BANKRUPTCY

Determinations made by the United States Supreme Court on June 25, 1982 have established fundamental uncertainties regarding the jurisdiction and powers of the bankruptcy court under Section 241(a) of Pub. L. 95-598, 92 Stat. 2549. Northern Pipeline v. Marathon Pipe Line and United States, etc., Nos. 81-150 and 81-546. Four members of the Court determined that "the broad grant of jurisdiction to the bankruptcy courts contained in § 241(a) is unconstitutional," specifically addressed in footnote 40 certain options and considerations relevant to the issue, and then held that such decision shall apply only prospectively and also stayed judgment affirming the district court until October 4, 1982 to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication without impairing the interim administration of the bankruptcy laws." Opinion of Justice Brennan at 37-38.

Two members of the Court concurred in the judgment, prospective application and stay after observing that "this grant of authority (to entertain and decide Northern's lawsuit over Marathon's objection) is not readily severable from the remaining grant of authority to Bankruptcy Courts under § 241(a), see ante, at 37 n. 40, ..." Concurring opinion of Justice Rehnquist at 4. The essential proscription in each opinion appears to be that bankruptcy court judges, who do not have the protection afforded by Article III of the Constitution, may not make final determinations in a "state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law" unless the

litigants consent. Dissenting opinion of Chief Justice Burger at 1.

However, it appears that six members of the Court have determined nevertheless that the bankruptcy courts, after October 3, 1983, absent further action by Congress or the Supreme Court in the meantime, will be without all of the jurisdiction and powers assigned by Section 241(a) under Section 405(a) (1) of Pub. L. 95-598 with respect to all civil proceedings arising under title 11 of the United States Code or arising in or related to cases under such title 11. It is not possible to determine at this time, absent further action by Congress or the Supreme Court, what jurisdiction and powers the district court may have after October 3, 1982 in bankruptcy proceedings under Section 405(a) (2) of Pub. L. 96-596 or existing 28 U.S.C. Sec. 1334 which remains effective until April 1, 1984 under Sections 238 and 402(b) of Pub. L. 95-598. This general order is entered accordingly to advise and inform attorneys, debtors, creditors and other parties in interest with respect to proceedings now or hereafter pending in this court.

IT IS THEREFORE ORDERED:

1. This order, intended for the period June 28 through October 3, 1982, shall be effective forthwith and until further order.

2. Discovery procedures and trial of any adversary proceeding now or hereafter pending wherein a trustee including a debtor in possession seeks to recover a judgment for money or property under 11 U.S.C. Sec. 542(b) (collection actions etc.) shall be suspended until further order of the court.

3. Trial of any adversary proceeding now or hereafter pending wherein a trustee including a debtor in possession

seeks to recover a judgment for money or property under 11 U.S.C. Sec. 550(a) (preference actions etc) shall be suspended until further order of the court.

4. Discovery procedures and trial of any adversary proceeding now or hereafter pending wherein any other litigant seeks to recover a judgment for money or property under nonbankruptcy law against a litigant who is not the debtor of the trustee including the debtor in possession shall be suspended until further order of the court.

5. All other adversary proceedings, and all bankruptcy proceedings not designated adversary proceedings, now or hereafter pending, shall continue and be concluded without interruption.

6. This general order shall not limit whatsoever the existing jurisdiction and powers of each bankruptcy judge to grant relief by motion or otherwise in particular cases or proceedings and is intended solely to provide general guidelines for this bankruptcy court pending further action by Congress or the Supreme Court with respect to the jurisdiction and powers of this court.

Dated & Filed: July 6, 1982

/s/ KENNETH G. OWENS
Executive Bankruptcy Judge

Attest: Filed July 6, 1982,
and copies mailed or
delivered on July 6, 1982

/s/ TIMOTHY R. WALBRIDGE
Clerk, U.S. Bankruptcy Court

Clerk, U.S. Bankruptcy Court

82-440

Office - Supreme Court, U.S.
FILED
SEP 14 1982
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER 1982 TERM

In re FARMERS UNION CENTRAL EXCHANGE, INC.; FARMERS PETROLEUM COOPERATIVE, INC.; FCX, INC.; LANDMARK, INC.; LAND O'LAKES, INC.; MIDLAND COOPERATIVES, INC.; MFA OIL COMPANY; and TENNESSEE FARMERS COOPERATIVE,	)	On a Petition For a Writ of Mandamus to the United States Bankruptcy Court for the Northern District of Illinois
Petitioners.	)	

MOTION FOR AN EXPEDITED DETERMINATION

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Counsel for Petitioners

Petitioners* respectfully move that the Court consider their Petition for a Writ of Mandamus on an expedited basis because it has a direct bearing on any action which this Court might take on October 4, 1982 regarding the stay of the judgment granted in Northern Pipeline Construction Co. v. Marathon Pipeline Co., No. 81-150 (June 28, 1982).

Specifically, petitioners propose that their petition be treated as their brief on the merits, and that any response be filed by September 27, 1982.

Respectfully submitted,

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* Petitioners' Rule 28.1 and Rule 28.4 statements are contained in their Petition for a Writ of Mandamus.

AFFIDAVIT OF SERVICE

David Schiffman, an attorney, certifies that on September 14, 1982, three copies of the Petition For A Writ of Mandamus and one copy each of the Motion For An Expedited Determination and the Motion For A Stay of Proceedings Pending a Determination On The Petition For A Writ Of Mandamus were served by Federal Express upon the Solicitor General, Department of Justice, Washington, D.C. 20530, and by first-class mail, with postage prepaid, upon the Honorable Frederick J. Hertz, United States Bankruptcy Judge and upon each person listed in the attached Service List. All parties required to be ser[illegible] have been served.

David Schiffman

SUBSCRIBED AND SWORN TO
before me this 14th day
of September, 1982.

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82-440

Office - Supreme Court, U.S.
FILED
SEP 14 1982
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER 1982 TERM

In re FARMERS UNION CENTRAL EXCHANGE, INC.; FARMERS PETROLEUM COOPERATIVE, INC.; FCX, INC.; LANDMARK, INC.; LAND O'LAKES, INC.; MIDLAND COOPERATIVES, INC.; MFA OIL COMPANY; and TENNESSEE FARMERS COOPERATIVE, Petitioners.	On Petition for a Writ of Mandamus to the United States Bankruptcy Court for the Northern District of Illinois

---

MOTION FOR A STAY OF PROCEEDINGS PENDING A DETERMINATION ON THE PETITION FOR A WRIT OF MANDAMUS

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Counsel for Petitioners

TO THE HONORABLE JUSTICE STEVENS:

Pursuant to Supreme Court Rule 44, petitioners respectfully move that the Court stay all proceedings below pending a determination by the Court on their Petition for a Writ of Mandamus. The petition seeks an order directing the Bankruptcy Court for the Northern District of Illinois to dismiss the complaints against petitioners on the grounds that "the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim." Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. 2858, 2880 n.40 (1982).

Petitioners* are defendants in two actions brought under the jurisdictional statute declared unconstitutional in Northern Pipeline. The complaints against petitioners seek more than $250,000,000 in damages under various theories, all arising under state law. The parties are just beginning an extensive deposition program; notices have already been filed for well over 100 depositions.

Because of the enormous expense involved in proceeding with this litigation, and because much that is done may have to be repeated when the cases are re-filed in a court of competent jurisdiction, this Court should stay the proceedings below until it can rule on the petition for a writ of mandamus. There is ample precedent for granting such relief. See, e.g., First Jersey Securities, Inc. v. Bergen, 605 F.2d 690, 692 (3d Cir. 1979), cert. denied, 444 U.S. 1079 (1980) (discovery stayed; mandamus ultimately granted dismissing complaint for lack of jurisdiction); Exchange National Bank of Chicago v. Wyatt, 517 F.2d 453 (2d Cir. 1975) (proceedings stayed; mandamus ultimately denied).

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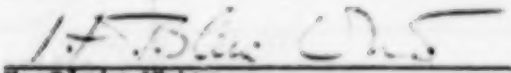
* Petitioners' statement under Supreme Court Rule 28.1 is contained in their Petition for a Writ of Mandamus.

In addition, a stay will serve the public interest in ensuring that the Constitution is obeyed and that bankruptcy judges cease hearing cases which can only be heard by Article III judges. Such a stay should not cause any hardship to the plaintiffs, for they can immediately re-file their complaints in state court.

WHEREFORE petitioners respectfully move that the Court enter an order staying the proceedings below pending a determination on their Petition for a Writ of Mandamus.*

Respectfully submitted,



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* Petitioners initially moved in the Bankruptcy Court for a stay pending appeal. That motion was denied (Exhibit A) on the basis of a General Order entered by the District Court for the Northern District of Illinois, which stated that "no stay of any proceedings in the bankruptcy court prior to 4 October 1982 is warranted by the Marathon decision." (Appendix to the Petition for a Writ of Mandamus, p. 7a). The Seventh Circuit never ruled on petitioners' motion for a stay. (Appendix, p. 1a).

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE ENERGY COOPERATIVE, INC., Debtor	No. 81 B 005811 (Chapter 11 Case) Judge Hertz
ENERGY COOPERATIVE, INC., Plaintiff, and CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, et al., Intervening Plaintiffs, v. FARMERS UNION CENTRAL EXCHANGE, INC., et al., Defendants.	Adversary No. 81 A 3286
ENERGY COOPERATIVE, INC., et al., Plaintiffs, v. THE PERMIAN CORPORATION, et al., Defendants.	Adversary No. 81 A 2075

ORDER

This matter coming before this Court on the motion of the Member Owners to stay further proceedings pending appeal of the denial of their motions to dismiss or stay this action, and the Court having received memoranda and heard arguments,

IT IS HEREBY ORDERED that the motion to stay further proceedings pending appeal is hereby denied. (General Order of the Chief Judge of the United States District Court, Northern District of Illinois, dated July 14, 1982; Northern Pipeline Construction Co. v. Marathon Pipeline Co., et al., Nos. 81-150 & 81-156, decided June 28, 1982, p. 38. Judgment stayed until October 4, 1982.)

ENTER:

FREDERICK J. HERTZ
U. S. BANKRUPTCY JUDGE

Dated: July 29, 1982

AFFIDAVIT OF SERVICE

David Schiffman, an attorney, certifies that on September 14, 1982, three copies of the Petition For A Writ of Mandamus and one copy each of the Motion For An Expedited Determination and the Motion For A Stay of Proceedings Pending a Determination On The Petition For A Writ Of Mandamus were served by Federal Express upon the Solicitor General, Department of Justice, Washington, D.C. 20530, and by first-class mail, with postage prepaid, upon the Honorable Frederick J. Hertz, United States Bankruptcy Judge and upon each person listed in the attached Service List. All parties required to be served have been served.

David Schiffman

SUBSCRIBED AND SWORN TO
before me this 14th day
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ALEXANDER L. STEVAS
CLERK

[redacted]

Supreme Court of the United States

October Term [redacted]

In re FARMERS UNION CENTRAL EXCHANGE, INC.; FARMERS PETROLEUM COOPERATIVE, INC.; FOX, INC.; LANDMARK, INC.; LAND O'LAKES, INC.; MIDLAND COOPERATIVES, INC.; NEW ULM COMPANY; and TRUMAN FARMERS COOPERATIVE,

Petitioners.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

[redacted]

[redacted]

[redacted]

QUESTIONS PRESENTED FOR REVIEW

1. Is a writ of mandamus appropriate when the Member-Owners have sought to appeal the Bankruptcy Court's decision to the District Court for the Northern District of Illinois?

2. Is the Bankruptcy Court's assertion of jurisdiction so incorrect that the issuance of a writ of mandamus is appropriate?

3. Should this Court stay its judgment in *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 102 S. Ct. 2858 (1982), beyond October 4, 1982?

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In the Supreme Court of the United States

OCTOBER 1982 TERM

No. 82-440

In re FARMERS UNION CENTRAL EXCHANGE, INC.; FARMERS PETROLEUM COOPERATIVE, INC.; FCX, INC.; LANDMARK, INC.; LAND O'LAKES, INC.; MIDLAND COOPERATIVES, INC.; MFA OIL COMPANY; and TENNESSEE FARMERS COOPERATIVE,

Petitioners.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Energy Cooperative, Inc., Debtor and Debtor in Possession ("ECI"), seven banks[1] who are creditors of ECI,

[1] The banks are: (1) Continental Illinois National Bank and Trust Company of Chicago, acting on its own behalf, as agent for Seattle-First National Bank, First National Bank of Minneapolis, First National Bank and Trust Company of Oklahoma City, Bank of Montreal (California), and the First National Bank of Boston, and as security agent for St. Louis Bank for Cooperatives; (2) Seattle-First National Bank; (3) First National Bank of Minnea-

(footnote continued)

Sonatrach[2] and the Official Committee of Unsecured Creditors of ECI submit this brief in opposition to the Member-Owners'[3] petition for a writ of mandamus.[4]

SUMMARY OF ARGUMENT

A fundamental requirement for the issuance of a writ of mandamus is that the party seeking the writ must have no other adequate means to attain the relief he desires. Because the Member-Owners have the right to seek immediate, direct review of the Bankruptcy Court's order in the United States District Court for the Northern District of Illinois ("the District Court")—a right they have exercised—they have an adequate means to attain the relief they desire and are foreclosed from obtaining the extraordinary remedy of mandamus.

In addition, the Member-Owners' interpretation of this Court's opinion in *Northern Pipeline Construction Co.* v.

(footnote continued)

polis; (4) First National Bank and Trust Company of Oklahoma City; (5) Bank of Montreal (California); (6) First National Bank of Boston; and (7) St. Louis Bank for Cooperatives. ECI and the banks are plaintiffs in Adversary Proceedings No. 81A 3286 in the Bankruptcy Court and counterclaim-defendants in Adversary Proceeding No. 81 A 2075 in that Court.

[2] Sonatrach is the commonly used abbreviation for Societe Nationale Pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures. Sonatrach is the counterclaim plaintiff in Adversary Proceeding No. 81 A 2075.

[3] The Member-Owners are the stockholders of Energy Cooperative, Inc. They are defendants in Adversary No. 81 A 3286 and third party defendants in Adversary No. 81 A 2075.

[4] The statement required by Supreme Court Rule 28.1 is contained in Respondents' Response to Petitioners' Motion for an Expedited Determination.

Marathon Pipeline Co., 102 S. Ct. 2858 (1982) (*"Northern Pipeline"*), is contrary to the opinion's plain language. This Court held flatly that "we stay our judgment," yet the Member-Owners assert that the Court's judgment has not been stayed in its entirety. The Member-Owners also ask this Court to hold that part of the jurisdiction conferred by the Bankruptcy Act of 1978 ("the Bankruptcy Act") is constitutional and part is not, a result inconsistent with this Court's conclusion that Section 241(a) of the Act cannot be severed.

Finally, this Court should reject the Member-Owners' suggestion that this Court should not extend the stay of its judgment in *Northern Pipeline* beyond October 4, 1982 if Congress fails to restructure the Bankruptcy Act by that date. If this Court's stay were not extended, the bankruptcy courts after October 4 would not be able to exercise *any* of their jurisdiction. Such a result would impose an enormous hardship on debtors and creditors throughout the nation.

ARGUMENT

"[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34 (per curiam) (1980). The party seeking mandamus has "the burden of showing that its right to issuance of the writ is 'clear and indisputable.'" *Will* v. *United States*, 389 U.S. 90, 96 (1967), citing *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953). Thus, writs of mandamus should "*hardly* ever" be granted. *Allied, supra*, 449 U.S. at 36 (emphasis in original).

As we shall demonstrate, this case does not present the extraordinary circumstances necessary for mandamus.[3] The petition should be denied both because the ordinary appellate process provides the Member-Owners with an adequate means of review and because their interpretation of *Northern Pipeline* is clearly incorrect.

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[3] The Member-Owners seek a writ of certiorari to the United States Court of Appeals for the Seventh Circuit if their petition for a writ of mandamus is denied. (Pet. at 13, n. 12). Because the Member-Owners have already sought mandamus from the Seventh Circuit, it would be more orderly to treat this proceeding as a petition for a writ of certiorari rather than for a writ of mandamus. If the petition is treated as one for a writ of certiorari, the Member-Owners have a double burden: first, they must show that the Seventh Circuit was incorrect in denying mandamus; and second, they must show that this case is of such urgency that the granting of certiorari is appropriate.

I.

A WRIT OF MANDAMUS SHOULD NOT BE GRANTED WHEN THE RIGHT TO SEEK AN IMMEDIATE APPEAL TO THE DISTRICT COURT IS AVAILABLE.

Pursuant to 28 U.S.C. § 1334(b),[6] the Member-Owners have asked the District Court for leave to appeal the Bankruptcy Court's interlocutory order denying their motion to dismiss or stay the proceedings in that court. The availability of such an immediate right to seek review renders a writ of mandamus from this Court inappropriate.

This Court has repeatedly held that a requirement for a writ of mandamus is "that the party seeking issuance of the writ have no other adequate means to attain the relief he desires. . . ." *Helstoski* v. *Meanor*, 442 U.S. 500, 505 (1979), citing *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976). Supreme Court Rule 26 reiterates this requirement, stating that the issuance "of any extraordinary writ authorized by 28 U.S.C. § 1651 is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that . . . adequate relief cannot be had in any other form or from any other court."[7] Writs of mandamus

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[6] 28 U.S.C. § 1334(b) provides:

> "The district courts for such districts [that do not have appellate panels appointed pursuant to 28 U.S.C. § 160] shall have jurisdiction of appeals from interlocutory orders and decrees of bankruptcy courts, but only by leave of the district court to which the appeal is taken."

Under Section 405(c)(2) of the Bankruptcy Act, the jurisdiction of the district courts and the courts of appeals to hear bankruptcy appeals during the transition period until April 1, 1984 is the same as it will be after that date.

[7] Supreme Court Rule 27.2(a) further requires that a petition for mandamus "set forth with particularity why the relief sought is not available in any other court."

"cannot be used as substitutes for appeals." *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953). In *Helstoski, supra,* this Court applied these principles and held that a constitutional challenge to the jurisdiction of the district court could not be maintained by a petition for a writ of mandamus when the petitioner had an immediate right of appeal. 442 U.S. at 506. The Member-Owners' right to seek an appeal here presents a similar barrier to mandamus.

To grant mandamus in this case would undermine the system of appellate review enacted by Congress in the Bankruptcy Act. Under that Act, parties are entitled to appeal final judgments and orders of the bankruptcy courts to both the district courts and the courts of appeals, but they are not permitted to appeal interlocutory orders beyond the district courts.[8] This Court should be reluctant to interfere with Congress' judgment that as to interlocutory orders a single level of review would minimize delays and is adequate to protect litigants against incorrect decisions by the bankruptcy courts.

Moreover, there is no reason to permit the Member-Owners to depart from the restrictions imposed by the ordinary appellate process. If the Bankruptcy Court's interpretation of *Northern Pipeline* and decision that it presently has jurisdiction were incorrect, that decision would be fully reviewable in the District Court, the Seventh Circuit, and this Court after any final judgment or order were entered by the Bankruptcy Court. The availability of adequate review after final judgment precludes the

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[8] See 28 U.S.C. §§ 1293(b), 1334(b); *In re Licek Potato Chip Co.*, 599 F.2d 181, 183 n.2 (CA7 1979); *In re Kutner*, 656 F.2d 1107, 1112 (CA5 1981). The substance of Sections 1293(b) and 1334(b) is applicable during the transition period until April 1, 1984 under Section 405(c)(2) of the Bankruptcy Act.

granting of mandamus. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (per curiam) (1980). The Member-Owners' grievance does not rise above a claim that they will be put to unnecessary inconvenience and expense if the litigation proceeds. Such a claim is insufficient to justify mandamus. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953). In any event, there will be little, if any, wasted effort involved in the continuation of the proceedings. For example, any depositions taken in this action would be useable in other federal courts or in state courts, if these proceedings are dismissed. See Fed. R. Civ. P. 32(a); Fed. R. Evid. 613, 801(d), 804(b)(1); Ill. Rev. Stat. ch. 110A, § 212(a)(1).[9] Documents produced in the proceedings would be similarly useable.

II.

THE BANKRUPTCY COURT HAS JURISDICTION UNDER NORTHERN PIPELINE.

A. The Plain Meaning of the Northern Pipeline Opinion Supports Jurisdiction.

Even if a writ of mandamus were not precluded by the existence of alternate avenues of relief, the Member-Owners do not have the required "clear and indisputable" right to the issuance of such a writ. To the contrary, the Member-Owners' position is inconsistent with a plain reading of the *Northern Pipeline* opinion. As the Member-Owners concede (Pet. at 9), the Court declared unconstitutional *all* of the jurisdictional grant contained in Section 241(a) of the Bankruptcy Act, 28 U.S.C. §§ 1471-

[9] Should the suits be brought in the Illinois courts, the state Circuit Court would be able to use the sworn depositions as if they were discovery depositions and thus use them for impeachment, as admissions of a party, or as affidavits for summary judgment purposes. Ill. Rev. Stat. ch. 110A, § 212(a)(1).

1482. While the case before the Court involved exclusively state law claims brought by the debtor against a third party, the Court expressly refused to hold that the bankruptcy courts as presently constituted could hear bankruptcy cases that did not involve such claims. Instead, the Court declined to sever Section 241(a) and declared that it was up to Congress to decide how to recast the Bankruptcy Act, stating:

> "In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis . . . . We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III, in the way that will best effectuate the legislative purpose."

102 S. Ct. at 2880 n. 40 (plurality opinion). Justices Rehnquist and O'Connor, in concurring in the judgment, also agreed that the statute was not severable. Id. at 2882.

After concluding that it could not sever Section 241(a) and that all of that provision was therefore unconstitutional, the Court stayed its judgment, stating:

> "However, we stay our judgment until October 4, 1982. This limited stay will afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws. *See Buckley* v. *Valeo*, 424 U.S. 1, 143 (1976); cf. *Georgia* v. *United States*, 411 U.S. 526, 541 (1973); *Fortson* v. *Morris*, 385 U.S. 231, 235 (1966); *Maryland Comm.* v. *Tawes*, 377 U.S. 656, 675-676 (1964)." 102 S. Ct. at 2880.

In light of this language in the opinion, the Member-Owners' interpretation of *Northern Pipeline* cannot be sustained. Section 241(a) of the Bankruptcy Act requires the bankruptcy courts to exercise the jurisdiction set forth in that provision. Until and unless this Court enters an order or judgment restraining the exercise of that jurisdiction, the bankruptcy courts may—and indeed must—exercise it. As of now, this Court has not entered any such judgment or order. Rather, it expressly held that "we stay our judgment."[10] Consequently, there is *no* judgment of this Court in the *Northern Pipeline* case outstanding.

Notwithstanding the lack of *any* judgment, the Member-Owners are asking this Court to require the Bankruptcy Court to act as if a partial judgment in *Northern Pipeline* has been entered; they argue that the Bankruptcy Court should decline to exercise the portion of its Section 241(a) jurisdiction that requires the adjudication of state law claims while continuing to exercise the remainder of its Section 241(a) jurisdiction. Such a result would be wholly inconsistent with this Court's refusal to declare only a portion of Section 241(a) unconstitutional and the remainder of the statutory grant of jurisdiction constitutional. The Court declared *all* of Section 241(a) unconstitutional, stayed *all* of its judgment, and stated that it was up to Congress to decide how to recast the jurisdictional grant in the Bankruptcy Act during the interim period while the judgment was stayed. 102 S. Ct. at 2880 and n. 40. The Member-Owner's suggestion that some, but not all, of Section 241(a) is presently enforceable must be rejected in light of the Court's express holding on this subject.

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[10] "To 'stay' an order or decree means to hold it in abeyance, or refrain from enforcing it." *Black's Law Dictionary* 1267 (5th ed. 1979).

B. The Authority Cited in Northern Pipeline Demonstrates this Court's Intention to Permit the Bankruptcy Courts to Exercise Their Jurisdiction Through October 4, 1982.

That this Court intended for the bankruptcy courts to continue exercising their jurisdiction is demonstrated by the cases the Court cited in staying its judgment.

The first and most important of the cases cited, *Buckley* v. *Valeo*, 424 U.S. 1 (1976), had two holdings, only one of which is relevant to the issues in this case. In its first holding, the one not of concern here, the Court held that certain campaign expenditure limits violated the rights of candidates to freedom of speech. These provisions could not be enforced by any tribunal at any time, and the invalidation of them was therefore not stayed. In its second holding, the Court held that the Federal Election Commission, to the extent that it had been given power to enforce various substantative (and constitutional) provisions of the Federal Election Campaign Act, was improperly constituted under the Appointments Clause (Const., Art. III, §2, cl. 2). It is the latter holding that is the one relevant to this case, and it is the latter holding that was stayed so as to allow the Commission to operate during an interim period in which Congress would have an opportunity to cure the constitutional defects. The Court, indeed, stayed its holding in language almost identical to that used in *Northern Pipeline:*

> "This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the interim to function de facto in accordance with the substantive provisions of the Act." 424 U.S. at 143.

The other cases cited in *Northern Pipeline* also permitted interim actions by unconstitutionally organized bodies. Thus, in *Georgia* v. *United States*, 411 U.S. 526 (1973), an unconstitutionally elected state house of representatives was permitted to remain in office and to act on an interim basis. Similarly, an unconstitutionally apportioned Georgia assembly was permitted to remain in office in *Fortson* v. *Morris*, 385 U.S. 231 (1966). Finally, this Court permitted an unconstitutionally apportioned Maryland legislature to sit for two years until the regularly scheduled 1966 elections in *Maryland Committee* v. *Tawes*, 377 U.S. 656 (1964).

In citing cases that permitted tribunals which had been unconstitutionally organized to proceed with their business pending legislative correction of the constitutional problems, this Court in *Northern Pipeline* made clear that it intended the bankruptcy courts to continue exercising their jurisdiction while Congress attempts to remedy Section 241(a).

III.

THIS COURT SHOULD EXTEND ITS STAY OF THE JUDGMENT IN NORTHERN PIPELINE BEYOND OCTOBER 4, 1982.

The Member-Owners argue that there is no reason for this Court to extend the stay of its judgment in *Northern Pipeline* beyond October 4, 1982 if Congress fails to restructure the Bankruptcy Act by that date. Apparently conceding that unless the stay is extended (or Congress acts) the bankruptcy courts would be without jurisdiction to hear *any* claims after October 4, they contend that such a result would be acceptable because the federal district courts could hear bankruptcy cases that do not involve state law claims while state courts could hear purely state law claims. (Pet. at 10-12).

Although the question of whether to extend the stay is not properly before the Court on this petition for a writ of mandamus, respondents feel compelled to respond to the unsound arguments raised by petitioners. Neither the district courts nor the state courts are equipped to handle the enormous volume of cases that are now being processed in the bankruptcy courts. As a practical matter, the Member-Owners' suggestion would, if accepted, cause the administration of bankruptcies in the United States to come to a halt. Such a result would cause severe prejudice to thousands of debtors and creditors throughout the nation.

In addition, the Member-Owners' suggestion that purely state law claims relating to bankruptcies can be heard by state courts ignores the primary reason that this Court declined to sever Section 241(a) of the Bankruptcy Act: to permit *Congress* to decide how to restructure that Act. If Congress decides to change the status of the bankruptcy judges so that they could hear state law claims without running afoul of this Court's decision in *Northern Pipeline*, it would be unfairly prejudicial to litigants who wish to bring such claims in the bankruptcy courts to compel them to file their claims elsewhere during the interim period before Congress had made its decision. Thus, this Court should extend its stay if Congress has not acted by October 4.[11]

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[11] This Court permitted a similar extension of its stay in *Buckley* v. *Valeo*. See 424 U.S. at 936.

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus should be denied. Additionally, if the Member-Owners' petition is treated as a petition for a writ of certiorari, certiorari should be denied.

Respectfully submitted,

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